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Supreme Court of the United States

No. 194. October Term 1935.

ETHEL M. DORRANCE, *et als.*,
Appellants,
vs.
J. H. THAYER MARTIN, *et als.*,
Appellees.
} *On Appeal.*

APPELLEES' BRIEF ON THE QUESTION OF JURISDICTION.

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July 12, 1935.

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On Appeal.

APPELLEES' BRIEF ON THE QUESTION OF JURISDICTION.

Statement.

This is a direct appeal, under Section 266 of the Judicial Code, from a decree entered June 4, 1935, in the District Court for the District of New Jersey, denying appellants' motion for interlocutory injunction.

Following Rule 12, paragraph 3, appellees included in, and filed with, their statement as to the jurisdiction of the court, a motion to dismiss.

Complying with Rule 7, paragraph 3, appellants have filed a brief in opposition to that motion.

Appellees respectfully submit this reply. It follows the order of points in, and page references herein are to, that brief.

ARGUMENT.

I.

Action to Collect the Tax.

(pp. 3-7.)

The only provision in the statute for an action of debt is contained in the following portion of section 1 of the act:

> "All taxes imposed by this act shall be at the respective rates hereinafter specified upon the clear market value of such property to be paid to the State Tax Commissioner and deposited with the Treasurer of the State, when and as collected, for the use of said State, and all administrators, executors, trustees, grantees, donees or vendees, shall be personally liable for any and all such taxes until the same shall have been paid as hereinafter directed, for which an action of debt shall lie in the name of of the State of New Jersey."

(*N. J. P. L. 1931, Ch. 303, p. 749, at pages 750-1; N. J. P. L. 1934, Ch. 244, p. 698, at page 700*). It does not apply to the collection of the tax out of the estate itself, or to the enforcement of a final decree of the Prerogative Court establishing the validity of the tax or the amount due, as in this case.

The assessment, and the amount of the tax, in question, having been sustained (on all questions of law as well as of fact) by the final decree of the Prerogative Court (which decree was affirmed by the state Supreme Court), the statutory procedure for collection is that described in sections 21 and 22 (*Appl. Br. pp. 3-4*).

Such a proceeding is not a new or distinct proceeding, or an independent action. It is an essential step in the assertion of the power of the Prerogative Court to issue proper process to enforce its decree. Such jurisdiction continues until the decree has been satisfied. This be-

comes plain from a brief consideration of the origin, nature and process of that court.

It was the ancient prerogative of the bishop of the diocese to administer the estates of decedents therein. This was done in the Prerogative Court of which the bishop (or "ordinary") was judge. *2 Blackstone's Com. 509-10; 3 Idem., 66.*

That court was transplanted in the Colony of New Jersey by Queen Anne's instructions (November 16, 1702) and commission (December 5, 1702) to Lord Cornbury, the first Royal Governor after the surrender of the proprietary government, *Leaming & Spicer's "Grants and Concessions" (Instructions) pp. 638-9, (Commission) pp. 650, 651, 652,* and continued down to the American Revolution, and was adopted by the State Constitution of July 2, 1776, which vested that jurisdiction in the governor as chancellor and ordinary. *Arts. VIII, XXII, 5 Thorpe's Am. Charters, pp. 2596, 2598. In Re Coursen's Will, 4 N. J. E. 408, 412, 415; In Re Hodnett, 65 N. J. E. 329, 337-8.*

When the powers of government were separated by the Constitution of 1844, the office and jurisdiction of the ordinary and judge of the Prerogative Court were vested in the chancellor, where they still remain. *Dickinson's Probate Court Practice (1884) pp. 2-5.*

From 1844 onward to and including the present time, the State Constitution has provided:

> "The judicial power shall be vested in a court of errors and appeals in the last resort in all causes as heretofore; a court for the trial of impeachments; a court of chancery; a prerogative court; a supreme court; circuit courts, and such inferior courts as now exist, and as may be hereafter ordained and established by law; which inferior courts the legislature may alter or abolish, as the public good shall require."
>
> *Art. VI, Sec. I, pgf. 1.*

"The chancellor shall be the ordinary or surrogate general, and judge of the prerogative court."

Art. VI, Sec. IV, pgf. 2.

5 Thorpe's Am. Charters, 2608, 2609,

The Constitution of 1776 provided "That the common law of England, as well as so much of the statute law, as have been heretofore practiced in this colony, shall still remain in force, until they shall be altered by a future law of the legislature; * * *" (*Art. XXII*). Like provision has been carried through to the present constitution (*Art. X*) *5 Thorpe's Am. Charters, pp. 2598, 2613.*

By the above inclusion of the Prerogative Court as part of the judicial system of the state, that tribunal became a judicial tribunal, as well as a constitutional court, which could not be altered or abolished. There was nothing to prevent the legislature from extending its jurisdiction to additional subjects, but the legislature could not deprive the decrees of that court of their quality of being conclusive. *Harris* v. *Vanderveer's Executor* (Court of Errors and Appeals), 21 N. J. Eq. 424, 427-8.

The jurisdiction of the Prerogative Court, both in England and in the Colony and State of New Jersey, including its appellate jurisdiction, is discussed in *Dickinson's Probate Court Practice, pp. 7-10, 11-12.*

Adhering to its common law forms and procedure, and regarding succession taxes as kindred to the succession of prosperity, the legislature of New Jersey, from the enactment of the first succession tax act in 1909 (*N. J. P. L. 1909, Ch. 228, sec. 18, p. 334*), has consistently provided the right of appeal from the appraisement or assessment, to the Ordinary, as the judge of the Prerogative Court, and has conferred upon him "jurisdiction to hear and determine all questions" (*ibid. p. 335*) in the same manner as he has jurisdiction to hear and determine all questions relating to other matters within his appellate

jurisdiction. The statute prescribed no practice or procedure, but left that to the established forms in that court, namely, (a) petition of appeal; (b) answer; (c) order of reference to a vice ordinary; (d) hearing; (e) findings of fact and conclusions of law; (f) final decree; and such other preliminary or intermediate proceedings as may be necessary (*Ans. pp. 49-95*).

In New Jersey, as in England, the Prerogative Court has always had the quality of a court of equity, and the rules of equity practice were followed in its procedure. *Bugbee* v. *Van Cleve*, 99 N. J. Eq. 825, 833.

Except for a few special writs (none of which are applicable here), courts following equity procedure were without power to enforce their decrees except by citation for contempt. *2 Daniell's Chy. Pl. & Pr. (Perkins Am. Ed.) 1054 et seq.* For that reason section 21 of the inheritance tax act provides for a citation to bring the parties before the Ordinary to show cause why such tax should not be paid in accordance with its decree. The common law procedure on such a citation was to punish for contempt. Declaratory of that procedure the legislature, in 1900, enacted a law respecting the Prerogative Court, and the power and authority of the Ordinary; section 7 of which reads as follows:

> "7. If any person shall neglect or refuse to obey any citation, or to perform any sentence or decree of the ordinary or judge of the prerogative court, it shall be lawful for such ordinary and such court to cause such person or persons, by process directed to any sheriff of any county of this state, to be taken and imprisoned until he shall obey the said citation, or perform the said sentence or decree; and every sheriff is hereby directed to cause all such process to him at any time directed, to be duly executed, and to confine the person against whom such process shall be issued, as in execution, until he shall be delivered by due course of law; and if any sheriff shall neglect his duty therein, he shall be answerable

to the party aggrieved in such manner as he would be answerable upon process of a like nature issuing out of the supreme court." (*N. J. P. L. 1900, Ch. 148, p. 347.*)

In the transfer inheritance tax act of 1909 (now sec. 21) the legislature directed that proceedings on such citation shall conform to the practice prevailing in the Prerogative Court, and added, that the decree of the court thereon shall, upon request of the State Tax Commissioner, be docketed and filed by the Clerk of the Supreme Court, or by the County Clerk of any county, with the effect of a judgment lien upon the property of the estate, and that execution be issued thereon, in accordance with the rules and practice appertaining to judgments of other courts docketed therein, and, particularly, with the practice of docketing in the Supreme Court clerk's office decrees of the New Jersey Court of Chancery (*N. J. P. L. 1902, p. 524*).

Thenceforward, collection is pursued as prescribed for civil judgments, in "An Act respecting executions" (*N. J. Revision 1877, pp. 389 et seq.; 2 N. J. Comp. Stat. pp. 2243, et seq.*).

Since the only proceeding which the statute prescribes for enforcing the court's decree is that described in sections 21 and 22, the injunction (either preliminary or final) sought by appellants, if granted by the court, could, in effect, do nothing but enjoin the procurement of the citation as a process to compel the parties to obey the final decree of the court. The jurisdiction of the court continues, and the matter is still a proceeding in that court until the decree is satisfied. *Ruggles* v. *Simonton,* 20 Fed. Cas. No. 12,120; *Am. Ass'n.* v. *Hurst,* 59 Fed. 1; *Leathe* v. *Thomas,* 97 Fed. 136; *Ke-Sun Oil Co.* v. *Hamilton,* 61 Fed. (2d) 215, 218.

Appellants labor under the mistaken impression that the statutory limit of one year allowed for appeal to the Court of Errors and Appeals constitutes a *minimum,* rather

than a maximum, limit. The argument amounts to the claim that that provision conferred a vested right to immunity from earlier action to enforce the decree of the Prerogative Court; that theory implies that during that appeal period appellees *cannot* take any action to enforce the court's final decree, and that meanwhile appellants *need* not obey that decree. If that is so, the extraordinary remedy by writ of injunction in the federal court is unnecessary, since there was nothing to enjoin.

Appellants are also mistaken in the argument that mere intention to appeal to the state court of last resort (not yet expressed by notice of appeal) affords immunity from the enforcement of the decree. It is encumbent upon them to make a selection of remedies between the state and federal courts. They have no right to go through the state courts as far as they choose, then suddenly switch to the federal courts, and at the same time hold open a line of retreat through the state courts if they are disappointed in the federal court.

If the statements in the last paragraph on page 6 of the brief are true, an application for injunction in the federal court was unnecessary, since an equally effective stay was obtainable (as of right) on an appeal to the state court of last resort.

There was, therefore, a "proceeding" in a court of the State of New Jersey, within the meaning of Section 265 of the Judicial Code, which appellants sought to enjoin. In that respect the decree of the District Court was correct.

II.

The proceedings in the New Jersey Courts were judicial.
(pp. 7-12.)

Except to state the fact that the decree of the Prerogative Court was final and conclusive, and binding upon the parties unless and until reversed by a higher court, nothing need be added to what has been said under Point I respecting the character of that court, particularly since the decree of the District Court was not rested upon the final decree of that Court, but upon the final judgment of the State Supreme Court.

It matters not whether the jurisdiction of a court is conferred by the constitution or by statute, the character and effect of the proceedings therein determines whether its function is administrative or judicial. *City Bank Farmers Trust Co.* v. *Schnader,* 291 U. S. 24. Otherwise all the federal courts, save this court, would be administrative, since they are created, and their jurisdiction is defined, by statute.

Nor does it matter by what vehicle of pleading the case is brought before the court. Proceedings instituted by a motion are sufficient. *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 165.

The New Jersey Supreme Court is a constitutional court, (*Const. Art. VI, sec. IV, pgf. 2, supra*), with the powers and prerogatives of the Court of King's Bench in England (*Const. Art. X, supra*). The power of that court to review on *certiorari* the final decree of the Prerogative Court was not conferred by statute; it was one of the inherent prerogatives of the court under the common law. *State* v. *Justices, etc. of Middlesex County,* 1 N. J. L. 283 (old paging 244); *Dufford* v. *Decue,* 31 N. J. L. 302, 305, 307; *Jersey City* v. *Lembeck,* 31 N. J. E. 255.

That inherent power of review on *certiorari* has, from the beginning, been exercised to review tax assessments generally, *Black's Law of Taxation, 4th ed. Sec. 279a, p. 394;* and extends to the review of inheritance taxes. *Black's Law of Taxation, 4th ed. Sec. 129h, p. 181; Roebling's Estate, 91 N. J. E. 72, 75.*

The provisions of Section 11 of the Certiorari Act, quoted at page 9 of appellants' brief, are merely declaratory of the common law, and do not, and could not, diminish the inherent power of the court, under the New Jersey constitution (cases cited in the last two preceding paragraphs and *Harris* v. *Vanderveer's Executor*, 21 N. J. E. 424, 427.

In *Royal Mfg. Co.* v. *City of Rahway*, 75 N. J. L. 416, and *Trenton & Mercer County Tr. Co.* v. *Mercer County Board of Taxation*, 92 N. J. L. 398, cited on page 9, and *Gibbs* v. *State Board*, 101 N. J. L. 371, cited on page 10, the Supreme Court reviewed assessments made by boards of assessors, who were admittedly administrative bodies, and not the final decree or judgment of a court, yet in a like case subsequently decided (in 1926) the Court of Errors and Appeals held that the revisory power conferred upon the Supreme Court by Section 11 of the Certiorari Act "is not mandatory or obligatory," and sustained that court in setting aside the assessment and remanding the case back to the state tax board for further proceedings not inconsistent with its decision. *Kearny* v. *State Board*, 103 N. J. L. 26, 27.

The essential qualities of judicial tribunals, as defined in *City Bank Farmers Trust Co.* v. *Schnader, supra,* were present in both the Prerogative and the Supreme Courts. Section 20 of the inheritance tax act conferred upon the Prerogative Court jurisdiction "to hear and determine all questions in relation to any tax levied under the provisions of this act" (*N. J. P. L. 1909, p. 335*). The same power,

already inherent in the Supreme Court, is declared by Section 11 of the Certiorari Act (*Appl. Br. p. 9*). In both courts the proceedings were *inter partes* (*Ans. pp. 71, 87, 96, 104*); the court had power to decide, and did decide, all questions as to the validity, as well as to the amount, of the assessment; the final decree of one, and the final judgment of the other, were both final and conclusive judgments of courts of record of competent jurisdiction, binding upon the parties, unless and until reversed by a higher court.

It is true that the state was not a party *eo nomine* in either court, but the state was the real party in interest and was represented by a state officer in his official capacity, who is one of the defendants in the same representative and official capacity in this suit. If, as Appellants claim (p. 12), not the state, but only the State Tax Commissioner, had an interest in those proceedings or their results, why are the other state officers joined as defendants (or appellees here) in these suits? When collected, the tax goes to the state, and not to the individuals. (See section 1 of the inheritance tax act quoted at the beginning of this brief.)

> "The state is the principal and the action of her officers rightly may be imputed to her, even though a suit for injunction might be against them." *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 591.

III.

Res Judicata.

(pp. 12-14.)

The only "intention" to appeal to the Court of Errors and Appeals which New Jersey practice recognizes is a Notice of Appeal (*N. J. S. C. Rule 137*). No such notice of appeal has been served. A declaration of such intention in the complaint (pfg. 40) amounts to nothing.

It is claimed (*pp. 13-14*) that the right to invoke the jurisdiction of the federal court cannot be barred by a plea of *res judicata*, unless the pleaded judgment is either that of the state court of last resort and the period for appeal or petition for certiorari to this court has expired, or is the judgment of a lower court in which the parties have acquiesced without resort to the appellate court. In support of that claim they cite *Eastern B. & L. Assn. of Syracuse* v. *Welling*, 103 Fed. 352, 355; *Grubb* v. *Public Utilities Commission*, 281 U. S. 470, and *American Surety Co.* v. *Baldwin*, 287 U. S. 156.

In the first case the plea of *res judicata* was rejected because the judgment of the state court pleaded therein had been removed on writ of error to the Supreme Court of the United States and was there pending and undecided at the time the plea was filed. In the present case no appeal has been taken from the judgment of the state court. The judgment of the New Jersey Supreme Court is final until reversed by a higher court. The fact that the time for appeal has not expired is of no consequence. So far, the parties have acquiesced in that judgment.

The second case holds squarely opposite to appellant's contention under this point. It sustained the plea of *res judicata* on a judgment of the state court in a proceeding which was instituted after the suit in the federal court, in which the judgment was pleaded, was commenced, and

was carried to conclusion and the judgment entered before the District Court proceeding was concluded. There, as here, the only ground of federal jurisdiction alleged in the bill was that the suit arose under the Constitution of the United States and involved more than $3,000 (p. 473).

The court held that the state and federal courts have concurrent jurisdiction of suits arising under the Constitution and laws of the United States, except where otherwise expressly restricted by Congress; that the suit was of such a nature that it could proceed in both courts, in virtue of their concurrent jurisdiction, until there was a final judgment in one, when that judgment would become conclusive in the other as *res judicata* (p. 476).

It held that the state court's decision on questions of local law would be accepted as controlling in this court (p. 477). It held that the judgment of the state court was *res judicata* in the federal district court (p. 479).

The third case likewise holds squarely against appellants' contention. The reference to proceedings (*p. 14*) taken in the state court "which ripened into a final judgment," taken from page 164 of the decision, refers back to the obligations of the bond of the Surety Company (recited at p. 160 of decision) which provided that if the judgment was appealed and affirmed and it did not make payment under the bond within 30 days from the filing of the remittitur from the Supreme Court "judgment may be entered on motion of the respondents in their favor against the undersigned surety." Under this language of the bond judgment was entered without notice. It was the obligation of the bond which "ripened into" a final judgment. In that case this court said:

> (p. 165) "But an adequate state remedy was available; and having invoked that and pursued it to final judgment, the Surety Company cannot escape the effect of the adjudication there.
>
> . . . . . .

(p. 167) "Since the constitutional issue as to jurisdiction might have been presented to the state Supreme Court and reviewed here, the decision is a bar to the present suit insofar as it seeks to enjoin the enforcement of the judgment for want of jurisdiction."

(p. 169) "Having invoked the state procedure which afforded the opportunity of raising the issue of lack of notice (due process of law), the Surety Company cannot utilize the same issue as a basis for relief in the federal court."

IV.

Jurisdiction under Section 266 of the Judicial Code.

(p. 15)

It is precisely upon the difference between this case and that of *City Bank Farmers Trust Co.* v. *Schnader*, 291 U. S. 24, mentioned by appellant under this point, that we rest our view that section 266 does not apply to this case. Admittedly, the federal court intervened, in the Schnader case, at the end of the administrative appraisement of the property involved; in this case the jurisdiction of the federal court was not invoked until two judicial tribunals had reviewed, and entered final judgments on the review of, the appraisement.

Under Point I of this brief it is shown that what appellants sought to enjoin in the District Court was nothing more nor less than the process of entering judgment and issuing execution upon a final decree of the Prerogative Court. Appellants do not seek to enjoin the carrying out of a statute which requires them to do something, or forbids them to do something, under a penalty, nor do they seek to restrain the enforcement of an order or regulation of an administrative board or body. They seek to enjoin appellees from enforcing a final decree of a judicial tribunal. If this view is correct, it was not a case for

three judges. The result may be that the statutory court had no jurisdiction to make the decree appealed from, but candor requires the presentation of this view to the court. However, if that is so, then it follows that an injunction (either interlocutory or final) cannot be issued in any federal court in this case, and the complaint should be dismissed.

V.

The Pennsylvania Suit.

(pp. 16-17.)

Under this point appellants argue that the judgment of the Pennsylvania Supreme Court was binding on all the parties to this suit, whether they were parties to that suit or not, because the judgment in the Pennsylvania case was entered in a proceeding *in rem*. It is true the proceeding was *in rem*, but the very reason why the Prerogative Court held that the Pennsylvania court had no jurisdiction was because the *res* was not within the jurisdiction of the Pennsylvania court. Not a dollar, or an article, of the property of the estate was located in Pennsylvania and obviously it could not exercise jurisdiction *in rem* of property located beyond its territorial limits. The fact was that not only was the *res* located in New Jersey, but that it was, and still is, being administered in a proceeding *in rem* in the Orphans' Court of Burlington County, New Jersey (*Ans. p. 74*).

The attempt, in the fourth paragraph on page 16 to implicate the State of New Jersey into some form of participation in the Pennsylvania litigation is obviously futile.

VI.

Conclusion.

Appellants having voluntarily submitted to the New Jersey Prerogative Court (*Petition of Appeal, Ans. pp. 49-59*) and to the Supreme *Court* (*Reasons, Ans. pp. 96-103*) all questions of law and fact alleged in the bill of complaint in this suit and obtained a final adjudication of those questions in each of those courts, and having the opportunity as a matter of right (with a stay against the collection of the tax) to appeal from the final judgment of the state Supreme Court to the New Jersey Court of Errors and Appeals, and thereafter (in case of an adverse decision) to invoke a review in this court (*American Surety Co.* v. *Baldwin*, 287 U. S. 166, 167), no substantial federal question is presented on this appeal.

For the foregoing reasons this appeal should be dismissed.

Respectfully submitted,

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Dated: July 10, 1935.